IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
ORDINARY ORIGINAL CIVIL JURISDICTION.

WRIT PETITION NO. 2180 OF 2005.

Ashok Mahadeo Palvankar .... .,
Petitioner
V/s
The State of Maharashtra & Ors... . ....
Respondents.

Mr.R.M. Nakhwa with Mr.V.B. Dhawan, adv. for the petitioner.

Mr.P.G. Sawant, AGP for respondent Nos.1, 3 and 4.

Mrs.A.R. Joshi, Adv. for respondent No.2.

Mr.Suresh Mali, Adv. for respondent No.5.

Mr.N.D. Jaywant for respondent No.6.

CORAM: F.I. REBELLO, J.

30.8.2005.

Oral Judgment:

Rule.

Heard learned advocates for respective parties.

Rule made returnable forthwith.

A notice came to be served on the petitioner under section 33 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 dated 2.12.2004. It was set out in the notice that the Slum Rehabilitation Authority had sanctioned redevelopment scheme of final plot bearing CS No.882(pt) under section 33(10) of Development Control Rule 1991. As part of Slum Rehabilitation scheme Subhash Khedekar respondent

No.5 herein was held eligible for alternate accommodation as per the S.R.A. Rules and Regulations. The petitioner was informed that the society developer has informed the authority that the petitioner has occupied the structure GSM-13/3A unauthorisedly and was not vacating the same. The structure is obstructing the development work of the society. It was also set out that Subhash Khedkar-Respondent No.5 was held eligible for the structure bearing No.GSM-43/3A. The petitioner was therefore called upon under section 33 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971, hereinafter referred to as the `Slum Act' and rules made thereunder, to show cause within 15 days from the receipt of the notice as to why the petitioner should not be evicted from the said structure for enforcement of the said scheme.

On 10.2.2005 the petitioner herein addressed a letter to respondent No.2 who has been designated and empowered by Municipal Commissioner to exercise and perform functions of the Competent Authority to hear dispute between himself and respondent No.5. It was set out that before the petitioner and his advocate could reach the office of respondent No.2, respondent No.2 had already called the papers. Personal attempts to meet respondent No.2 did not succeed and the petitioner was orally informed that the orders have been passed to `file proceedings'. It was also pointed out by the counsel for the petitioner that he could not reach in time as he was appearing in some other Court and therefore requested to adjourn the hearing of the case to any other convenient date and time. The objections raised by respondent No.2 were rejected by a speaking order dated

31.3.2005. This order is also the subject matter of the present petition. Aggrieved by the order dated 31.3.2005 the petitioner preferred an appeal before the Commissioner, Konkan Division, being Slum Appeal No.114/05. Written arguments were also submitted on behalf of the petitioner before the Appellate Authority. The Appellate Authority thereafter by its order dated 19.7.2005 was pleased to dismiss the appeal preferred by the petitioner herein. This order is also the subject matter of the present petition.

2. At the time of hearing of the petition on behalf of the petitioner learned counsel contends that (i)the petitioner was not given fair opportunity in as much as the hearing was concluded before they reached the office of the respondent No.2. They could not reach the office on account of reasons set out in the letter dated 10.2.2005, they therefore ought to have been given fresh opportunity as set out in the said letter. Having been denied the opportunity the impugned order should be set aside and the matter be remanded back to the respondent No.2 for a fresh hearing. (ii) It is further submitted that there was ample documentary evidence on record in support of the case of the petitioner. There has been non consideration of relevant documents and consequently also the order of the respondent No.2 as also of the Appellate Authority are liable to be quashed and set aside.

Learned counsel has relied upon firstly on the judgment in the case of ***Taj Mohamed Yakub*** v. ***Abdul Gani Bhikan***, 1991 Mh.L.J. 263. It may be pointed out that the said judgment is totally inapplicable in so far as the

present issue is concerned. What the learned Division Bench of this Court was considering was whether in a case where decree was obtained against a trespasser and the trespasser fell under the definition of occupier under the provisions of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 whether decree could be executed. The Court held that the decree could not be executed without securing permission of the Competent Authority. Secondly, reliance was placed on a judgment in the case of ***Shivaji Krishan Zunjare*** v. ***State of Maharashtra & Ors.***, 2004 (4) Mh.L.J. 764. The issue there was, that the respondent in that petition, the original allottee had departed from the premises and the petitioner was a trespasser. However, subsequently the Deputy Collector recognised the position of the petitioner as a protected occupier. The petitioner was then forcibly evicted from the premises by police and at the instance of the respondent Maharashtra State Road Transport Corporation. This Court held that the owner of the structure had no right to participate in the Slum Rehabilitation Scheme in view of clear provisions of Regulation 33 (10). This judgment therefore will also be of no avail considering the issue involved in the present petition.

3. We may firstly advert to some of the facts and material on record so as to appreciate the contention of the petitioner that he was not given a fair opportunity of hearing. Admittedly in the instant case petitioner has no photo pass. Photo pass was issued in the name of respondent No.5. The case of the petitioner is that he was in occupation and exclusive possession of shop premises being shop No.2 admeasuring about 7.1/2 x 20 at Fitwala

Road, Jupiter Mill Compound, Elphinstone, Mumbai-13 and was paying all the outgoings and carrying on business in the name and style of Gurukripa Scrap Merchant. As can be seen from the order of the Appellate authority the case of the petitioner was that he along with Respondent No.5 were carrying on the business of scrap merchant and the petitioner was helping Respondent No.5 and as such the name of the Respondent No.5 was included in the photo pass. The petitioner and respondent had purchased two shops being shop Nos.2 and 3 and as they were doing business jointly the municipal licence was taken in the name of Respondent No.5. From the order of the Appellate Authority it can further be noted that it was argued on behalf of the petitioner that prior to 1985 respondent No.1 and the appellant were doing the business of scrap jointly and after 1985 respondent No.5 herein was doing the business of garment and at the time of appeal was doing transport business at Parel. His argument was that he was the owner and carrying on business in shop No.2. It was contended that the petitioner and respondent No.5 were in need of premises and had purchased two premises being shop No.2 and shop No.3 by paying equal amounts. They were initially doing the business together. In 1993 differences arose between the petitioner and the respondent No.5 and they started their separate and individual business. The petitioner, it is contended is the owner of shop No.2. The Appellate Authority noted the contention of respondent No.5 that the petitioner had taken forcible possession of the premises on 23.2.2004 of the suit shop and was doing business of scrap merchant.

4. The question then emerges and was required to be considered by the

respondent Nos. 2 and 3 therefore was whether the petitioner herein was able to establish that he occupied independent premises other than the premises in respect of which respondent No.5 has been held eligible as part of SRA scheme. Respondent No.2 in his findings which have been recorded has identified the structure as being hut No.43/3A the disputed hut. A certificate of the Shop & Establishment Act issued by the department under No.T/S I 4800 in favour of Respondent No.5 was held not to be in respect of the disputed hut as it mentioned shop No.2. The licence dated 1.12.1986 was held that there was no zopada number and it was not possible to establish that it was in respect of the hut in dispute. The electricity bill which was produced was not considered as it was in respect of shop No.2. The receipt for payment of compensation dated 8.2.90 was held to be of the disputed hut. The agreement for development with the Developer was held to be in respect of disputed but No.43/3A. Then the document produced by the petitioner herein were considered. The Gumasta Certificate was in respect of hutment No.2 and not in respect of disputed hut 43/3A. Certificate of Weights & Measure could not be held in respect of disputed hut. Copy of the Bank Statement again it was mentioned refers to shop No.2. Income-tax statement of the year 1998-99 it is stated mentions shop Nos.2 and 3 and not the disputed structure. The other documents were also held not applicable or in respect of shop No.2. Respondent No.2 however noted that on a scrutiny of the census form of the year 1976, it has been mentioned that the petitioner as the servant of Respondent No.5, hut No.GSM-43/3A. It was therefore held that the hut in dispute was of Respondent No.5. It may be

mentioned that nowhere has the petitioner contended that he has applied earlier for photo pass on the ground that he was in possession of the structure as an occupant. Considering that material the respondent No.2 came to the conclusion that the petitioner was in unauthorised occupation of the premises and therefore directed him to vacate the premises.

5. In the appeal preferred the Appellate Authority also has recorded a finding on the material that the structure in dispute is identified under No.43/3A and after considering all the documentary evidence on record and the contentions urged came to the conclusion that the order passed was in respect of structure 43/3A and whereas the petitioner's case was in respect of whop No.2 which prima facie appears to be a different structure. The Appellate Authority noted that both petitioner and Respondent No.5 are claiming ownership of the same structure.

6. It is based on these findings of fact recorded by respondent Nos. 2 and 3 that the Court will have to consider whether the impugned orders are liable to be set aside. In so far as the ground first that no opportunity was given to the petitioner herein this is not a case where no opportunity was given to the petitioner. The petitioner filed documents and opportunity of hearing was given. The petitioner did not reach in time for the hearing and consequently the hearing was closed. The documentary evidence filed by the petitioner was considered as can be seen from the consideration of the same by the respondent No.2. Against that order an appeal was preferred. The documentary evidence which was produced was considered and findings is recorded that the documentary evidence produced is not in respect of shop

No.43/3A in respect of which SRA scheme was applicable but what the petitioner was contending was in respect of shop No.2 and accordingly the appeal was dismissed. It may be mentioned that though in the appeal memo the petitioner had raised a ground that he was not heard, yet in the written arguments filed before the Appellate Authority such a plea was not raised. In other words, it was abandoned. It will therefore not be possible to hold that merely on the ground that the petitioner was not able to reach the office of the respondent No.2 in time and the order had been passed by respondent No.2 the petitioner was deprived of opportunity of hearing.

7. In so far as the second contention is concerned it must be noted that it was case of the petitioner himself that the petitioner and respondent No.5 were doing business together. It is also the case of the petitioner that he was earlier assisting respondent No.5 and as such the photo pass was taken in the name of respondent No.5 as also the municipal licence. Synopsis in the petition will also show that they had asked the Corporation to demolish the partition wall between the two shops but the Corporation refused. In other words, all this would lead to the conclusion of reasonable inference that the business was being carried on in two premises. Whether it was jointly by the petitioner and the respondent No.5 is another aspect of the matter which need not be gone into. Suffice it to say that photo pass was in the name of respondent No.5 in respect of the structure which was identified as 43/3A. The entire case of the petitioner is on the basis that he was owner of shop No.2 and Respondent No.5 of shop No.3. The authorities below have not accepted the contention as the shop in the scheme is 43/3A. We are here

concerned with the structure which was subject matter of the dispute. Once a finding of fact is recorded by two authorities below it is not possible to interfere with the finding of fact in exercise of the extra ordinary jurisdiction of the Court as it is not a case of no evidence. Considering the contention as urged on behalf of the petitioner and Respondent No.5 the structure over which rights are claimed is the same. Consequently in so far as that structure is concerned this would not be a fit case for this Court to exercise its extra ordinary jurisdiction. Hence writ petition is dismissed. Rule stands discharged with no order as to costs.

9. Learned counsel on behalf of the petitioner request for stay of the order. In my opinion, there is no case made out for stay of the order. Stay refused.